No. 17-949

In The
Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, in his Official Capacity as Alaska Regional Director of the National Park Service, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF ALASKA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

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INTEREST OF AMICUS CURIAE

The State of Alaska's interest in this case is as a sovereign seeking to maintain regulatory control over tens of thousands of miles of its navigable waters. This case, before the Court for the second time, challenges a Ninth Circuit decision that interprets the Alaska National Interest Lands Conservation Act (ANILCA) as commandeering the State's traditional regulatory authority over its submerged lands and the navigable waters that flow over them for use by the United States. The decision below grants the National Park Service regulatory control over navigable waters wherever State-owned riverbeds fall within or are appurtenant to the boundaries of federal areas created by ANILCA, called Conservation System Units (CSUs)—notwithstanding the State's undisputed ownership of the submerged lands and ANILCA's express prohibition on treating state lands as though they are federally owned.

Alaska's "ownership of [its] submerged lands, and the accompanying power to control navigation, fishing, and other public uses of [its navigable] water is 'an essential attribute of sovereignty.'" *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (quoting *United States v. Alaska*, 521 U.S. 1, 5 (1997)); *Coyle v. Smith*, 221 U.S. 559, 573 (1911). The State therefore has a compelling interest in maintaining its ability to manage those waters for the best interests of all Alaskans.

By interpreting ANILCA to federalize management of Alaska's navigable waters for all purposes, the Ninth Circuit dramatically redefined and expanded the federal reserved water rights doctrine. Its approach conflicts with this Court's cases and will adversely impact Alaska and its people. The ruling ignores the reality of life in rural Alaska, where residents face unparalleled access challenges, acutely rely on the State's natural resources, and regularly use the State's waterways as transportation thoroughfares. The State has a strong interest in preserving its authority to manage its waters as Congress intended: freely using the waters for beneficial purposes, regulating them in accordance with constitutional obligations to manage Alaska's waters for the benefit of all Alaskan citizens, and protecting the Alaskans who rely on access to and use of the State's waters to provide for their families.

SUMMARY OF THE ARGUMENT

As this Court has recognized, this dispute concerns "vital issues of state sovereignty." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016). Since statehood, Alaska has owned the riverbeds of its navigable rivers. 43 U.S.C. § 1311(a); Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 339, 343 (1958). These rivers include the Nation River where John Sturgeon was operating his hovercraft in compliance with Alaska law; the Alagnak River where the National Park Service enforced federal regulations requiring Alaska to apply for

a permit to conduct salmon research in its own waters; the well-traveled Kuskokwim River where rural residents journey along waterways to access health care, food, fuel, and school supplies; and the thousands more rivers of great importance to Alaska and the Alaskans that depend on them. *See Alaska v. United States*, 201 F.3d 1154, 1164-66 (9th Cir. 2000); Pet. App. 32a-33a; Bureau of Land Management (BLM), Recordable Disclaimer of Interest (RDI), No. AA-086371 (June 10, 2013). Alaska's sovereign ownership of its submerged lands includes the right to regulate the waters that overlie them, *see United States v. Alaska*, 521 U.S. at 5, and the corresponding obligation to do so for the benefit of all Alaskans. Alaska Const. art. VIII, §§ 1-4, 14; *see Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

While Congress has the power to limit a state's sovereignty over its waters by directing federal regulatory control, a court cannot properly interpret a statute to have this effect "unless the intention was definitely declared or otherwise made very plain." *United States v. Alaska*, 521 U.S. at 34. Yet nowhere does ANILCA's text suggest Congress intended to give the Park Service plenary regulatory control over state waters that run through or are adjacent to a CSU. Instead, Congress endorsed Alaska's sovereign right to manage its lands, waters, and resources by providing that state, native corporation, and other private lands located inside CSU boundaries would not be managed as if they were federally owned. 16 U.S.C. § 3103(c). This distinction is essential to one of ANILCA's core purposes of

providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Sturgeon*, 136 S. Ct. at 1066; 16 U.S.C. § 3101(d). Alaska has a direct and profound interest in keeping its waterways open and regulating them in accordance with local needs, as Congress intended, and without broad federal regulatory interference.

But the Ninth Circuit's decision thwarts the plain text of ANILCA—stripping the law of the requirement that allows only waters to which the federal government has "title" to be considered public lands subject to federal management. *See* Pet. App. 16a. The court gave little attention to Alaska's sovereign interests, unconcerned that as a result of its decision, state land would be regulated as if it were public land, undermining ANILCA's explicit protections. Instead, the court enlarged the National Park Service's regulatory control over state waters—giving wholesale management authority to the federal government based on an unsupportable expansion of the federal reserved water rights doctrine. Pet. App. 12a-14a, 19a. The Ninth Circuit's decision contorts a doctrine that simply entitles the government to use or maintain a defined amount of water necessary for a specific purpose into a broad grant of regulatory authority that impermissibly overrides state regulation entirely. *See Cappaert v. United States*, 426 U.S. 128, 141 (1976); Pet. App. 16a. In so doing, the decision usurps the State's constitutional and statutory right to control its resources.

The Ninth Circuit ostensibly based its decision on the circuit's decades-old *"Katie John"* decisions. *See*

Pet. App. 13a; *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) [*Katie John I*]; *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) (*en banc*) [*Katie John II*]; *John v. United States*, 720 F.3d 1214 (9th Cir. 2013) [*Katie John III*]). But the *Katie John* decisions arose in the distinct subsistence context out of a desire to effectuate Congress's clear intention that Title VIII of ANILCA include a meaningful rural subsistence preference. *Katie John I*, 72 F.3d at 704. Applying the reserved water rights doctrine for the limited purpose of effecting the subsistence priority explicitly found in Title VIII of ANILCA is a far cry from finding broad federal regulatory authority over Alaska's navigable waters for all purposes. The Ninth Circuit's reliance here on the reserved water rights doctrine as a basis for including Alaska's navigable waters in the category "public lands" means the exception now swallows the rule, and the doctrine is no longer limited in application as required by this Court.

The Ninth Circuit's decision on remand again effectuates a federal takeover of Alaska's navigable waters, on different but equally faulty grounds. The court's new rationale continues to improperly construe ANILCA and the balance it struck between federal and state authority in Alaska, and it compounds that problem with an unsupported expansion of the federal reserved water rights doctrine—to the detriment of Alaska and its people.

ARGUMENT

I. The Ninth Circuit's Decision Deprives Alaska of Its Sovereign Right To Manage Its Navigable Waters To Benefit Alaskans.

The Ninth Circuit's ruling transfers State decision-making authority over how best to manage Alaska's waters to a federal agency. The decision deprives Alaska and its people of a key component of sovereignty granted at statehood, and contradicts the constitutional and statutory balance between conservation and Alaska's interests in self-governance and resource development. The Ninth Circuit's decision thus strikes at the heart of Alaska's sovereignty and upsets Congress's intended federal-state balance. In so doing, it inflicts real harms on the people of the State.

A. Alaska's ownership of its lands and waters is an essential aspect of its state sovereignty.

Alaska's authority to manage its lands and waters is a particularly important sovereign interest, inextricably tied to its history and self-governance. Indeed, Alaskans' interest in controlling the state's fisheries without unwarranted federal control was a principal motivation for statehood. *See* Victor Fischer, *Alaska's Constitutional Convention* 7-8 (1975). But the territory's lack of taxable industry and population stood in the way of statehood: "One of the principal objections to Alaska's admittance into the Union was the fear that the territory was economically immature and would be unable to support a state government."

Trustees for Alaska v. State, 736 P.2d 324, 335 (Alaska 1987). Before statehood, 98 percent of Alaska's land was owned by the federal government, leaving "little land available to drive private economic activity and contribute to the state tax base." *Sturgeon*, 136 S. Ct. at 1065. Ultimately, the 1958 Alaska Statehood Act "permitted Alaska to select 103 million acres of 'vacated, unappropriated, and unreserved' federal land—just over a quarter of all land in Alaska—for state ownership." *Id.* (quoting Statehood Act, Pub. L. No. 85-508, §§ 6(a)-(b), 72 Stat. 339, 340 (1958)). Congress concluded that "the Statehood Act sufficiently provided for Alaska's financial well-being. The land grant of 103,350,000 acres was perceived . . . as an endowment which would yield the income that Alaska needed to meet the costs of statehood." *Trustees for Alaska*, 736 P.2d at 336.

Alaska's constitutional delegates viewed state management of the anticipated grant of lands, waters, and resources as a serious sovereign responsibility. They drafted an entire natural resources article in the Alaska Constitution—Article VIII—with provisions designed to conserve and protect the State's lands, waters, and other resources while allowing for responsible access and use. Alaska's Constitution reserves the State's resources to the people "for maximum use consistent with the public interest"; mandates that the State manage replenishable resources on the sustained yield principle; and ensures free access to Alaska's navigable and public waters. Alaska Const. art. VIII, §§ 1-4, 14.

Alaska owns the riverbed of the Nation River, where Mr. Sturgeon was approached by armed federal officials. *See Alaska v. United States*, 201 F.3d 1154, 1156, 1164-66 (9th Cir. 2000) (affirming finding of navigability of Nation River at statehood, placing riverbed under State ownership). Alaska, like all states, took title to the lands underlying its inland navigable waters as a matter of constitutional grace by virtue of the equal footing doctrine and as an "essential attribute" of state sovereignty. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987); *see also Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel*, 429 U.S. 363, 374 (1977) ("[T]he state's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself."). Congress formally recognized and codified this conveyance in the Submerged Lands Act. *Alaska v. United States*, 545 U.S. 75, 79 (2005) (citing 43 U.S.C. §§ 1301 *et seq.*, § 1311(a); Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 339, 343 (1958) (incorporating Submerged Lands Act)).

Alaska's ownership of its submerged lands includes the power to regulate the waters for its people. *See United States v. Alaska*, 521 U.S. at 5. Indeed, that is the purpose of state ownership of submerged lands. *See Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). Along with title to the submerged lands, the State received management power over the navigable waters themselves, including over the fish located in the waters. *See id*; 43 U.S.C. § 1311(a) (defining the rights of states to include "ownership of the natural

resources within such lands and waters" and the "right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law"); 43 U.S.C. § 1301(e) (defining "natural resources" to include fish). A state's title to land underlying navigable waters includes the power, as the sovereign, "to control and regulate navigable streams." *Coyle v. Smith*, 221 U.S. 559, 573 (1911). States hold submerged lands in trust for the public to use the waterways for commerce, navigation, and fishing. *Illinois Cent. R.R. Co.*, 146 U.S. at 452 (holding state's title to lands under navigable waters "necessarily carries with it control over the waters above them"). Alaska statutes interpreting the Alaska Constitution similarly provide that Alaska "holds and controls all navigable or public water in trust for the use of the people of the state." Alaska Stat. § 38.05.126(b); *see also* Alaska Stat. §§ 38.05.127-.128.

Allowing the Park Service to broadly usurp the State's control over its navigable waters and manage the State's navigable waters as if they were a federal park infringes on Alaska's sovereign authority and responsibility to its people. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) (acknowledging that "navigable waters uniquely implicate sovereign interests"); *United States v. Alaska*, 521 U.S. at 5 (holding that ownership of submerged lands "is an essential attribute of sovereignty"). Such a federal takeover would thwart the public trust doctrine and hinder Alaska's sovereign power to ensure open access to its

waters for navigation, fishing, and commerce. *See Illinois Cent. R.R. Co.*, 146 U.S. at 452.

Another example of intrusive federal authority is found in Alaska's companion case, decided together with Sturgeon's in a consolidated opinion before the Ninth Circuit, No. 13-36166. Pet. App. 38a. There, Alaska challenged Park Service regulations requiring the Alaska Department of Fish and Game to obtain a permit before engaging in scientific research involving genetic sampling of chum and sockeye salmon on the State-owned Alagnak River. Pet. App. 30a, 38a. By requiring the State to ask for advance permission before accessing its own lands to conduct beneficial scientific research, the federal government unduly interferes with Alaska's ability to make use of its resources. Compliance with the permit's terms forced Alaska to accede to obligations and limitations that undermined its sovereign rights, including a prohibition on destroying the State's own research specimens without Park Service authorization; an obligation to "catalogue collected specimens into the NPS's Interior Collection Management System and label such specimens with NPS accession and catalog numbers"; and a requirement "to submit an Investigator's Annual Report and copies of other final reports and publications resulting from the study within a year of publication." Pet. App. 38a. Thus, under the Ninth Circuit's decision here, the Park Service has jurisdiction not only to unilaterally restrict access to Alaska's waters, but also to control whether and how Alaska conducts its own fisheries management

research—a shocking overreach of agency authority not reflected in any congressional text.

B. Loss of Alaska's sovereign power to manage its own waters will inflict serious harm on ordinary Alaskans.

Alaska's sovereign interests in its waters are not merely academic. The loss of State management authority inflicts real and unique harms on not just the State, but on ordinary Alaskans. Alaska is home to abundant natural resources, including over 12,000 rivers and three million lakes—the largest network of navigable waters in the country. Alaska has more than 100,000 miles of navigable waters, covering a greater area than the navigable waters of all the contiguous States *combined*. The State also is home to myriad fish and wildlife, significant oil and natural gas reserves, and economically viable subsurface mineral deposits. Alaska's vast terrain and wild beauty captivate the national imagination and its bounty of resources fortifies both the state and national economies. But Alaska's massive size, widely dispersed population, lack of developed infrastructure, variable topography, and extreme climate also make it the nation's most inaccessible state.

Over three-quarters of Alaska's 300 communities and roughly twenty percent of its 735,000 residents live in regions unconnected to the road system. Half of these residents live in the State's most remote villages, communities with disproportionately higher levels of

poverty and limited infrastructure, some lacking essential services like sanitation and safe drinking water. Rural citizens rely heavily on Alaska's resources to provide for their families. The State's ability to manage these resources in accordance with unique realities, local needs, and historical customs is thus critical to its sovereign interests.

Alaskans living off the road system primarily travel by all-terrain vehicles, small airplanes, snowmachines, and boats. Alaska's extreme climates and varied terrain further shape the unusual nature of the State's limited transportation options: severe storm patterns routinely disrupt air service and rivers seasonally evolve into ice roads. Alaska's waters provide essential travel corridors year round. Many rural citizens live in small, isolated villages stretched along rivers, and depend on these networks of water connections for their everyday needs. Major rivers like the Yukon and Kuskokwim serve as critical arteries for transporting commercial fuel and goods to much of western Alaska throughout the summer months. Especially in more remote areas, Alaskans rely on these waters to access health care, goods, and services; recreate; and travel to hunting and fishing grounds. In winter, Alaska's rivers freeze into highways for snowmachine, dogsled, and other vehicle traffic, remaining a vital part of the State's transportation infrastructure so that Alaskans can access vital natural resources as well as commercial goods and services. Alaska's rivers have functioned in this way for hundreds of years.

Because Alaska's rural villages are so isolated, residents in these communities also face economic challenges. Rural residents confront a formidable combination of high costs of living, little or no local tax base, few job opportunities, and limited earnings. Localized resource-based activities—such as local tourism and recreation-related jobs or small-scale mining, sport fishing, wildlife guiding, or trapping—often provide an essential part of families' incomes and contribute to the economic activity of the region.

Alaska has an acute interest in retaining its management authority over water-based access routes to address local needs—needs that might be ignored or eclipsed by federal land management agencies with singular preservationist priorities and a national constituency. *See, e.g.*, 54 U.S.C. § 100101 (describing purpose of Park Service regulation as "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations"). State regulators understand the unusual realities of life in Alaska and use that knowledge to design rules that consider local conditions, practices, and needs. But federal regulators—who may never even visit Alaska, let alone develop a nuanced understanding of the unique aspects of rural Alaskan life—lack this knowledge or focus. As a result, the regulations they impose can be ill-fitting for Alaska. For example, in permitting hovercraft to operate on state waters,

Alaska has prioritized opening its waters to meet the access and transportation needs of residents like Mr. Sturgeon. But in conflict with Alaska's priority, the Park Service intercepted Mr. Sturgeon and barred him from taking his hovercraft to non-federally owned hunting grounds. The federal government's national prohibition on hovercraft use[1] might be sensible in Lower 48 parks where waters are often used only for recreational activities and tourism, but it is overbearing and harmful in Alaska, where, even in remote wilderness areas, citizens must use rivers for everyday transportation and to access necessities like food, fuel, and health care. In addition, while federal environmental policy may wax and wane with different administrations, Alaska remains under a continuing constitutional obligation to manage its resources responsibly according to sustained yield and other conservation principles. Alaska Const. art. VIII, §§ 1-4, 14.

What is at stake here for Alaska, therefore, is not just a disagreement with the National Park Service about permissible weekend recreation or the best method of routing tourists through national parks. Because "Alaska is different," *Sturgeon*, 136 S. Ct. at 1070, the State's continued management of its lands and waters is essential to maintain unencumbered

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[1] The regulation prohibiting hovercraft use, 36 C.F.R. § 2.17(e), "is not limited to Alaska, but instead has effect in federally managed preservation areas across the country." *Sturgeon*, 136 S. Ct. at 1067. It is not one of the Alaska-specific provisions "woven throughout ANILCA" that reflect Congressional attention to Alaska's uniqueness. *Id.* at 1071.

access and meaningful use of Alaska's natural resources by its citizens.

C. ANILCA's requirement that state lands be treated differently from federal lands protects Alaska's sovereign rights.

ANILCA reserved over 100 million acres of federal land in Alaska—an area larger than California—for the primary purposes of conservation and protection. 16 U.S.C. §§ 3101 *et seq*. Vast swaths of Alaska's new and expanded national parks, wildlife refuges, wild and scenic rivers, national trails, wilderness areas, and national forest monuments were organized into CSUs managed by different federal land management agencies. 16 U.S.C. § 3102(4). But ANILCA's CSU boundaries do not closely mirror federal land holdings: for every six acres of federal land within the CSUs there is one acre of non-federal land.

While ANILCA reserved massive amounts of land—significantly limiting the possibility for Alaska's future economic development—it also included provisions meant to protect Alaska's sovereignty, economic well-being, and way of life. As this Court explained, ANILCA had twin goals: to protect the national interest in scenic, natural, cultural, and environmental values on public lands in Alaska, but also to continue to "provide[ ] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and

its people." 16 U.S.C. § 3101(d); *accord Sturgeon*, 136 S. Ct. at 1066.

Congress protected Alaska's ability to direct the use of its own lands and waters in numerous ways. First, Section 103(c) assures Alaska's sovereign authority to manage its waters and lands by excluding from CSUs non-federal lands that happen to be located within unit boundaries. 16 U.S.C. §§ 3103(c), 3102(1), (3)(B)-(C), (11). This exclusion covered the lands and waters owned by the State, Alaska Native Corporations, and other private landowners at the time of ANILCA's passage. Second, ANILCA expressly states that non-federal "lands"—defined to include waters as well as uplands—falling within newly expanded park boundaries would not be regulated as if they were federally owned. 16 U.S.C. §§ 3102(1), 3103(c) (providing non-federal lands are not "subject to the regulations applicable solely to [federal lands] within such units").

Third, Section 103(c) provides that, should the federal government wish to regulate non-public lands as part of a system unit, it must first acquire them; only then may the new lands become part of the unit and "be administered accordingly." 16 U.S.C. § 3103(c). This is not to say that Congress exempted non-federal lands within CSUs from all federal oversight—instead Congress left in place (and unaffected by ANILCA) "[f]ederal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act . . . and other federal statutes and regulations of general applicability." S. Rep. No. 96-413, 303, reprinted in 1980 U.S.C.C.A.N. 5070, 5247. But by removing

these non-federal lands and waters from the reach of the extensive regulatory regime applicable to federally owned parklands nationwide and drawing hard boundaries between how the different categories of lands should be treated, Section 103(c) limits federal jurisdiction and protects against abuse of federal regulatory power. Finally, ANILCA contains a water rights savings clause specifying that the Act may not be construed as "(1) affecting in any way any law governing appropriation or use of, or Federal right to, water on lands within the State of Alaska"; "(2) as expanding or diminishing Federal jurisdiction, responsibility, interests, or rights in water resources development or control"; or "(3) as superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various" federal regulatory agencies involved in the Act. 16 U.S.C. § 3207.

Now, despite this Court's direction on remand to construe ANILCA in light of Alaska's uniqueness and the statute's language and context, *Sturgeon*, 136 S. Ct. at 1070-71, the Ninth Circuit again nullified that guarantee, awarding the Park Service—and presumably other federal land management agencies—broad authority to regulate state waters as though they were federal lands. The Ninth Circuit's decision endorses further federalization of State-owned resources and subjects Alaskans to federal regulatory control in a manner that Congress neither authorized nor intended.

II. The Ninth Circuit's Decision Misapplies § 103(c) and the Federal Reserved Water Rights Doctrine.

The Ninth Circuit's decision is not only based on its continued misreading of § 103(c), but also its fundamental misapplication of the federal reserved water rights doctrine. The Ninth Circuit ignores the clear statement rule, disregards congressional intent, and stretches the federal reserved water rights doctrine beyond all recognition by concluding that the Nation River—a navigable waterway owned and traditionally regulated by the State—qualifies as "public lands" because Congress implicitly reserved an undefined and unquantified amount of water when it created the Yukon-Charley preserve.

A. ANILCA does not contain the required clear statement of congressional intent to divest Alaska of control over its navigable waters.

The Ninth Circuit's analysis on remand ignored the gatekeeping legal doctrine that protects against unsanctioned federal encroachments on State power: the clear statement rule. This Court has held that "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear *in the language of the statute*." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)) (internal quotation marks omitted; emphasis added); *accord Vermont*

Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 787 (2000). The clear statement rule requires that any infringements on state sovereignty be "plain to anyone reading the [statute]." *Gregory*, 501 U.S. at 467. The rule is "an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. It is a crucial check on agency overreach based on the bedrock principle that "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States." *Id.* at 460.

The clear statement rule directly applies to this case, where the Federal Government seeks to override Alaska's "traditional and primary power over land and water use" by forcibly divesting Alaska of its authority over its submerged lands and navigable waters. *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (quoting *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) [*SWANCC*]). The rule applies "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 172-73. In *SWANCC*, the Court held that the clear statement rule foreclosed federal regulation of state waters where—as in this case—the proposed regulation was not clearly authorized by statute, would usurp traditional state sovereignty, and raised significant constitutional questions regarding the extent of federal authority. *Id.* at 172-74.

Instead of applying the clear statement rule as this Court's precedents direct, however, the Ninth Circuit approached the case as a routine question of statutory construction, disregarding the strength of Alaska's sovereign interests entirely in favor of a quest for definitional uniformity of the term "public lands" throughout the statute. Pet. App. 13a-14a. The Court began its analysis at the wrong place by assuming that *Katie John*'s narrow, context-based holding must be expanded to the entire statute. But the clear statement rule is not optional, and statutory construction canons alone can neither substitute for Congressional authorization nor overcome the lack of authority delegated by Congress. Proper application of the clear statement rule would have required finding in Mr. Sturgeon's favor. Instead, the Court skipped over this step, leading it to improperly expand *Katie John*'s holdings to justify a wholesale takeover of Alaska's navigable waters for non-subsistence purposes that Congress did not intend or sanction.

The Ninth Circuit's decision on remand flatly contravenes the clear statement rule. In direct conflict with this Court's precedents, the Ninth Circuit has authorized federal agencies to usurp Alaska's regulatory power along more than half of the State's navigable waters, based on a reserved water rights concept that appears nowhere in ANILCA's text or legislative history. Nor does ANILCA's definition of "public lands" as "lands, waters, and interests therein" the "title to which is in the United States," 16 U.S.C. § 3102(1), (2), clearly and manifestly include navigable waters,

because the government does not hold "title" either to an inchoate use right to a quantity of water, or to the underlying submerged lands. In fact, Congress expressed the intent to *exclude* navigable waters from the definition of "public lands," by explicitly exempting all "lands . . . granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). And as discussed above, § 103(c) compels the same conclusion.

The Park Service may argue that the federal government's navigational servitude justifies the infringement on Alaska's sovereignty here, BIO at 12, but this argument too ignores the clear statement rule. *See Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954) (holding that "the exercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization"). While the federal government possesses the theoretical power to override State regulation to protect navigation, it simply has not exercised that power here. The navigational servitude is a Commerce Clause power, *see, e.g., United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961), and ANILCA invoked the Commerce Clause only in connection with Title VIII's subsistence provisions. 16 U.S.C. § 3111(4). It has not granted the Park Service *any* authority under the Commerce Clause to regulate Alaska's waters for non-subsistence purposes. *See Katie John I*, 72 F.3d 698, 703 (9th Cir. 1995) ("Neither the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over

submerged lands and navigable Alaska waters."). A power that Congress declined to exercise cannot justify infringing Alaska's sovereignty.

B. Alaska's navigable waters are not public lands.

Equally compelling as ANILCA's silence on the subject of usurping traditional state power is what ANILCA does say about the dichotomy between the government's regulatory authority on public and non-public lands. ANILCA authorizes the federal government to regulate "public lands," which it defines as a subset of "[f]ederal lands." 16 U.S.C. § 3102(3) (excluding certain state and native corporation land selections). "Federal land" in turn is defined as "lands the *title* to which is in the United States." *Id.* § 3102(2) (emphasis added). And "land" includes "lands, waters, and interests therein." *Id.* § 3102(1). The Ninth Circuit's conclusion that Alaska's navigable waters are "public lands" under these definitions is unsupportable.

The United States does not hold "title" to navigable waters in which it has an implied water right, let alone to the submerged lands underlying Alaska's navigable waters. The Ninth Circuit conceded that "[r]eserved water rights are not a 'title' interest . . . in a narrow, technical sense," Pet. App. 16a (internal quotation marks omitted), but nevertheless found "a vested interest in the water" to be good enough. *Id.* at 17a. Even if an inchoate reserved water right that has

never been adjudicated and is not tied to the need for any particular quantity of water could properly be described as "vested," it still would not be sufficient to qualify as a title interest under ANILCA. If Congress intended that a non-title, judicially-created "interest" in theoretical uses of water could make a river "public lands" that are fully subject to the power of federal regulation, it would have written the statute to say that. It did not.

The Ninth Circuit reasoned that "the United States has an implied reservation of water rights [in the Nation River], rendering the river public lands." Pet. App. 19a. The court held that "non-public land is still subject to [regulations applicable only to public lands] if the United States retains an interest in it because the land is public to the extent of the interest." Pet. App. 8a. But this fails to honor the sovereignty protections of § 103(c). First, by defining public lands broadly enough to encompass State-owned waters, the Ninth Circuit decision disregards ANILCAs admonitions that state lands within the boundaries of the CSU are not part of the CSU and the government must first acquire those lands if it wants to regulate them. Second, the holding ignores the plain text of ANILCA, which cautions that land belonging to the State cannot be regulated as if it were public land. 16 U.S.C. § 3103(c).

And because the decision does not purport to defeat the State's continued title to its submerged lands, the regulations unlawfully regulate the State-owned submerged lands as if they were public lands. These

regulations do not apply only to a hypothetical "non-state" portion of the lands; they control what vehicles can travel on the submerged land, and what scientific studies Alaska can perform on riverbeds that it owns. Indeed, Mr. Sturgeon was stopped on a gravel bar between the ordinary high water marks of the Nation River—in other words, on State-owned submerged lands—illustrating how the decision in a very real way affects not only Alaska's sovereignty over state waters, but also over state submerged lands.

C. Even if the government has a reserved water right in the State's waters, that right is to use a defined quantity of water, not to supersede Alaska's regulation of navigable waters.

The Ninth Circuit's analysis also vastly overinflates the proper scope of any federal reserved water right by transforming a limited federal right to reserve a specific quantity of water into an assumption of total regulatory control over all the water. Its decision bootstraps a limited reserved water right into a full titled interest in order to find broad federal regulatory authority—causing the exception to swallow the rule, and to the detriment of Alaska. The court first achieves this by attempting to divorce Alaska's title ownership of the submerged lands from its sovereign responsibility over the navigable waters above them. Pet. App. 10a.

Although navigable waters themselves are not usually considered subject to traditional title

ownership, a sovereign's title to the bed of navigable waters "necessarily carries with it control over the waters above them." *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). Thus, the Submerged Lands Act recognized State assumption of both "submerged lands and waters." *United States v. California*, 436 U.S. 32, 37 (1978). This control and authority is constitutionally based, not merely statutory; under the equal footing doctrine, "the State's title to navigable waters within its boundaries is conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). Thus, "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable" as a matter of constitutional grace, allowing it to "allocate and govern those lands according to state law" as sovereign. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). Ever since statehood, then, Alaska has had sovereign control and management authority over its waters.

The Ninth Circuit's reasoning creates a strange disconnect between submerged lands and the waters above. The court acknowledged that Alaska holds title to the submerged lands underlying the Nation River, but it simultaneously held that the waters themselves are federal public lands subject to broad federal jurisdiction based on the government's reserved water right. Pet. App. 10a, 13a. This reasoning appears to decouple the state's control and management of the waters from its sovereign ownership of the submerged lands underneath them. But it has been well-settled

for over a century that a state's title to land underlying navigable waters includes "the right to control and regulate navigable streams." *Coyle v. Smith*, 221 U.S. 559, 573 (1911); *see also Illinois Cent. R.R. Co.*, 146 U.S. at 452. Congress also has enshrined this principle in statute. 43 U.S.C. § 1311(a) (defining the rights of states to include "ownership of the . . . natural resources within such lands and waters" and "the right and power to manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable State law.") The Ninth Circuit did not explain how ownership and control of the waters and lands could properly be split apart, either as a practical or legal matter.

The decision also inappropriately transforms the very nature of a federal reserved water right from a limited interest—allowing the government to *use* a specified amount of water—into an extremely broad jurisdictional doctrine—allowing the government to *assume full regulatory control* over entire rivers. This tremendous leap is entirely unsupported by law. Under this Court's jurisprudence, a federal reserved water right is a limited, non-ownership right to use or preserve a specific volume of water. *Cappaert v. United States*, 426 U.S. 128, 138-41 (1976). When the federal government withdraws and reserves lands for a public purpose, such as creating a national park, it "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Id.* at 138. This Court has strictly limited the scope of this doctrine: it applies only to "that

amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* at 141; *see also United States v. New Mexico*, 438 U.S. 696, 700 (1978).

Thus, in *Cappaert*, this Court examined the extent of the federal government's reserved water right in the Devil's Hole National Monument, a deep limestone cavern in Nevada containing a subterranean pool home to a rare and endangered pupfish. In establishing the national monument, Congress's direction to give special protection to the pool and the fish living in it established a federal reserved water right—but the government's interest extended only to preserve the exact amount of water necessary to keep the fish alive. *Id.* at 141. To ensure that the doctrine remains limited to the amount of water absolutely necessary to fulfill the government's purposes—a crucial check on federal authority—courts applying the doctrine "carefully examine[] both the asserted water right and the specific purposes for which the land was reserved, and [must] conclude[] that without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700.

The Ninth Circuit did not even try to adhere to this limiting principle. It made no attempt to constrain the scope of the Park Service's reserved water rights in accordance with this Court's case law, instead effectively granting the Park Service the broad, general regulatory authority that § 103(c) expressly prohibits. The court held that the Park Service's reserved water right extended to prevent any water use that might merely *impact* the purposes of the reservation. App.

17a-18a. This novel redefinition of federal reserved water rights vastly expands the doctrine and usurps Alaska's sovereign authority just because there may be *some* federal interest in *some* use of the water as a theoretical matter. And the Ninth Circuit's analysis no longer treats the reserved water rights doctrine as concerning use of a particular amount of water, as this Court has required. Instead, the Ninth Circuit has invoked the doctrine to justify a wholesale grant of federal management authority over Alaska's navigable waters. This is a startling expansion of the doctrine, and one with no foundation in this Court's jurisprudence.

Congress did not intend that a federal usufructuary right—an interest far less than title—would transform entire rivers into "public land," enabling broad federal regulation for all purposes. Section 103(c) itself makes this clear, since it limits the ability of the Secretary of the Interior to regulate state, private, or other non-federal lands unless it purchases or otherwise acquires them. Yet the Ninth Circuit now gives the Park Service this right to regulate state waters without any purchase, compensation, or acquiescence from the State. This Court should reject the Ninth Circuit's tortured reformulation of the federal reserved water rights doctrine, which contravenes federal law and undermines Alaska's sovereign rights.

III. In Restoring Alaska's Sovereignty Over Its Navigable Waters, this Court Need Not and Should Not Disturb the *Katie John* Circuit Precedents.

The Ninth Circuit's federal reserved water rights holding in this case was based on an unwarranted expansion of prior Circuit precedent, the *Katie John* decisions, which expanded the definition of public lands to include state-owned navigable waters in order to address an express and discrete part of ANILCA: Title VIII (Subsistence Management and Use), 16 U.S.C. §§ 3111-3126. *See Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) [*Katie John I*]; *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) (*en banc*) [*Katie John II*]; *John v. United States*, 720 F.3d 1214 (9th Cir. 2013) [*Katie John III*]). In Title VIII, Congress created a priority in the taking of fish and wildlife on public lands for rural subsistence users—Alaskans who practice and depend upon the "customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal and family consumption as food, shelter, fuel, clothing, tools, or transportation." 16 U.S.C. § 3113.

The *Katie John* decisions are not at issue in this appeal; the Question Presented concerns only Mr. Sturgeon's non-subsistence use of the Nation River, which does not fall within or implicate Title VIII at all. Neither party has asked this Court to overrule or reconsider *Katie John* in connection with Mr. Sturgeon's case. Thus, this Court need not directly address the prior circuit holdings in order to resolve this appeal.

Nor should the *Katie John* and *Sturgeon* decisions be tied together as the Ninth Circuit has done. Title VIII stands apart from the rest of ANILCA with its own findings, 16 U.S.C. § 3111, its own statement of policy, 16 U.S.C. § 3112, and—unlike any other part of the legislation—specific invocations of congressional authority under the Commerce Clause, the Property Clause, and Congress's "constitutional authority over Native affairs." 16 U.S.C. § 3111(4). Furthermore, while Congress began with the assumption and expectation that the State would enact and assume management authority over its subsistence regulations, as a backstop, Congress included language authorizing the federal government to step in if Alaska failed to act. 16 U.S.C. § 3115(d); *Katie John I*, 72 F.3d at 700 n.2. When the State found itself constitutionally unable to enforce state laws implementing the subsistence priority demanded by Congress because of the state constitutional guarantee of equal access to fish and game, *McDowell v. Alaska*, 785 P.2d 1, 5-9 (Alaska 1989), the federal government took over. *See Katie John I*, 72 F.3d at 701.

The Ninth Circuit decisions upholding this takeover of subsistence regulation were attempting to reconcile what were perceived as two conflicting statutory demands: the definition of public lands—which on its face does not include State navigable waters because Congress required a federal title interest—and the rural subsistence preference over fishing, which the court believed needed to include the navigable waters containing the fish in order to fulfill Congressional intent.

See, e.g., *Katie John I*, 72 F.3d at 704 ("We recognize that our holding may be inherently unsatisfactory. . . . If we were to adopt the state's position, that public lands exclude navigable waters, we would give meaning to the term 'title' in the definition of the phrase 'public lands.' But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing. . . . The issue raised by the parties cries out for a legislative, not a judicial, solution."). Since the *Katie John* rationale was rooted in Congress's discrete intent that there be an enforceable subsistence priority, nothing in the decisions' rationale warrants expanding their definition of public lands outside the subsistence realm. The Ninth Circuit identified a direct conflict within the statute between two commands—on the one hand, 16 U.S.C. § 3114's command that there exist an enforceable subsistence priority; and on the other, the statutory definition of "public lands," which would seem to vitiate that command (at least where Alaska is unable to effectuate the priority itself). By contrast, there is no conflict between the rest of ANILCA and the definition of "public lands." To the contrary, reading "public lands" according to its plain meaning in non-subsistence contexts effectuates the statute's purposes.

There are also prudential and policy reasons why this Court should preserve the *Katie John* precedents. Congress mandated the subsistence priority to protect the important values embodied by subsistence, 16 U.S.C. § 3111, and in the nearly twenty years since the federal government assumed management of

subsistence activities on federal lands in Alaska, rural Alaskans have depended on this subsistence priority to effectuate those values and preserve their way of life. Congress found that subsistence use by Alaskans is "essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence." 16 U.S.C. § 3111(1). It also found that many Alaskans had no realistic alternative to subsistence that could possibly "replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses." 16 U.S.C. § 3111(2). Congress's observations remain true today. The State's rural residents currently harvest about 18,000 tons of wild foods each year, averaging 295 pounds per person. And to many Alaska Natives, subsistence is not a recreational or purely practical activity, but rather a way of life, the lifeblood of cultural, spiritual, economic, and physical well-being. Subsistence activities under ANILCA are also crucial to Alaskans living in remote, undeveloped settings where residents rely on customary and traditional harvest of wild and natural foods because access to packaged and other processed and non-local foodstuffs may not be available at a reasonable price—or any price. Limited or nonexistent job opportunities to earn cash wages in rural Alaska, the high costs of living in remote areas, and the seasonal nature of rural Alaskan life further enhance the importance of subsistence to rural residents.

The Ninth Circuit believed that—having decided in *Katie John* that for Title VIII purposes that Alaska's

navigable waters are public lands by virtue of federal reserved water rights—it had no choice but to broaden that holding to apply with equal force to Mr. Sturgeon's non-subsistence activities. This reasoning is unsustainable and incorrect. The Ninth Circuit itself has recognized that *Katie John* was a "problematic solution to a complex problem, in that it sanctioned the use of a doctrine ill-fitted to determining which Alaskan waters are 'public lands' to be managed for rural subsistence priority under ANILCA." *Katie John III*, 720 F.3d at 1245. Instead of restricting the narrow, fact-specific holding to the unique context in which it arose and where it served to effectuate Congress's intent, the Ninth Circuit now has expanded it into a widespread, generally-applicable doctrine that entirely redefines federal reserved water rights law, where Congress has not willed it. This Court should reject the expansion of a compromise solution to a discrete problem into a wide-ranging justification for intrusive federal management of state lands and waters throughout Alaska.

"[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Although the Ninth Circuit believed itself controlled by its prior construction of the term "public lands" in the unique context of Title VIII, in fact, the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning" is not

controlling. *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). This Court has stressed that "the presumption of consistent usage readily yields to context, and a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2441 (2014) (Scalia, J.) (quoting *Duke Energy Corp.*, 549 U.S. at 574 (internal quotation marks omitted)).

This case presents a salient example of a circumstance where a complex statute's use of a term in different contexts is properly interpreted differently. Like the Clean Water Act, which was at issue in *Utility Air Regulatory Group*, ANILCA is a long, complex, and multifaceted statute. The context of Title VIII and the remainder of ANILCA differ in material and significant ways. Unlike the bulk of the statute, Title VIII explicitly calls upon separate Congressional policies and findings of purpose. 16 U.S.C. §§ 3111, 3112. Title VIII draws on the authority of the Property Clause, the Commerce Clause, and Congress's special powers over Native American affairs—constitutional sources of law that are conspicuously absent from the remainder of the statute. 16 U.S.C. § 3111(4). And Title VIII explicitly contemplates federal regulation if necessary to ensure that rural Alaska residents can engage in traditional and customary subsistence fishing activities. 16 U.S.C. § 3115(d). Furthermore, the Ninth Circuit itself has recognized that *Katie John*'s resolution of the meaning of "public lands" to incorporate a

federal reserved water rights rationale was employed only to effectuate Congressional intent. *Katie John I*, 72 F.3d at 704. None of this applies to the remainder of the statute. This Court need not and should not overrule *Katie John*, but it should reverse the Ninth Circuit's expansion of *Katie John* beyond the narrow and unique context in which it arose.

IV. The Park Service's Attempt To Regulate Non-Federal Waters Within CSU Boundaries Cannot Be Alternatively Justified by 54 U.S.C. § 100751(b).

For all the above reasons, the Ninth Circuit's decision is wrong and this Court should reverse it. But, as it did before, the Park Service may press an alternative rationale as a basis for affirmance by arguing that it does not matter whether Alaska's navigable waters are public lands or not. BIO at 14-15. The Park Service believes it has the authority to regulate both public and non-public lands alike pursuant to 54 U.S.C. § 100751(b), which provides that the Secretary may promulgate regulations "concerning boating and other activities on or relating to water located within System units." In the government's view, the "on or relating to" language gives the Park Service broad authority to regulate all the waters within CSU boundaries, even if they are not public lands. BIO at 14-15. This Court should reject any such claim. Alaska's ownership of submerged lands and corresponding right to regulate its navigable waters has meaning. If the Nation River and the rest of Alaska's navigable waterways are not

public land, the Park Service cannot nonetheless regulate them with the same regulations that apply to actual federal lands.

Allowing regulation of Alaska's lands and waters on the theory that they "relat[e] to" public lands would eviscerate § 103(c) and contravene the intent of Congress. This Court already has held that because "ANILCA repeatedly recognizes that Alaska is different," a reading of the law that does away with § 103(c)'s distinction between public and non-public land is unsustainable because it is "contorted and counterintuitive." *Sturgeon*, 136 S. Ct. at 1070-71. Allowing the Park Service to evade § 103(c)'s explicit limitations on federal jurisdiction over non-public lands merely by claiming that the non-public land is "relat[ed] to" public land would run afoul of this admonition. It would also render § 103(c) toothless and meaningless. After all, if all land and waters within CSU boundaries fall under federal jurisdiction merely because they "relat[e] to" adjacent public lands, then Congress's command that non-federal land must be treated differently from federal land would mean nothing at all. Such an interpretation would contravene "one of the most basic interpretive canons": "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks omitted)). This Court should reject the Park Service's continuing efforts to nullify § 103(c).

CONCLUSION

The Court should reverse, restoring Alaska's sovereignty and fulfilling Congress's promise.

Respectfully submitted,

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